

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of 1991 ) CG Docket No. 18-152

**REPLY COMMENTS OF THE NATIONAL COUNCIL OF HIGHER EDUCATION RESOURCES TO THE REQUEST FOR COMMENTS ON INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION ACT IN LIGHT OF THE D.C. CIRCUIT’S ACA INTERNATIONAL DECISION**

The National Council of Higher Education Resources (“NCHER”) is submitting reply comments to comments provided on the record in response to the public notice request issued on May 14, 2018 (the “Public Notice”) released by the Federal Communications Commission (the “FCC” or “Commission”) asking for comments on the Commission’s interpretation of the Telephone Consumer Protection Act (“TCPA”) in light of the District of Columbia Circuit’s *ACA International* decision. NCHER is a national, nonprofit trade association representing state, nonprofit, and private higher education agencies that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education (the “Department”) to service and recover outstanding loans made under the William D. Ford Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program (“FFELP”) and private education loans.

Prior to the deadline for public comments, several organizations and individuals, including NCHER, responded to the Public Notice. While we did not have the opportunity to review all the comments provided by other respondents, the following are our thoughts on selected organizational comments:

NCHER’s comments filed on June 13, 2018 focused on the barriers that previous interpretations of the TCPA have imposed in the context of communicating with student loan borrowers and the resulting harm to consumers. For this reason, we read with interest the comments submitted jointly by the Student Loan Servicing Alliance, Navient Corp., Nelnet Servicing LLC, and the Pennsylvania Higher Education Assistance Agency (the “Joint Comments”).<sup>1</sup> These organizations, like many of NCHER’s members, are involved in the servicing of federal student loans. NCHER concurs and supports the Joint Comments. In particular, we support the position that the Commission should confirm that federal contractors are immune from TCPA liability when they comply with directions of the federal government, as the Commission clarified in the *Broadnet Declaratory Ruling*. We also support the position that the Commission should reconsider the rules adopted in 2016 (the “Federal Debt Rules”) to implement Section 301 of the Bipartisan Budget Act of 2015 (the “Budget Act Amendment”) because those rules are so narrow as to render the Budget Act Amendment meaningless. We also note that the Joint Comments state that data and reports demonstrate that additional telephone outreach over and above that permitted by the Federal Debt Rules is critical.<sup>2</sup> In support, the Joint Comments refer to the

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<sup>1</sup> Comments of the Student Loan Servicing Alliance, Navient Corp., Nelnet Servicing LLC, and the Pennsylvania Higher Education Assistance Agency (filed June 13, 2018).

<sup>2</sup> *Id.*, p. 11.

annual report of the Student Loan Ombudsman at the Bureau of Consumer Financial Protection (BCFP), which states that current outreach efforts “may be insufficient to assist a substantial share of borrowers navigating the default-to-IDR [Income-Driven Repayment] transition.”<sup>3</sup> In further support of a higher limit on calls to collect federally-held or -guaranteed debt, the Joint Comments point out that the BCFP has proposed far less restrictive calling limits for debt collection calls in its Outline of Proposals Under Consideration and Alternatives Considered released in 2016.<sup>4</sup> The BCFP’s position was further outlined in its comments submitted in response to the Public Notice, which stated that “Consumers benefit from communications with consumer financial products providers in many contexts,”<sup>5</sup> a position with which we wholeheartedly agree. With respect to the issue of what constitutes an Automated Telephone Dialing System (“ATDS”), the BCFP states that it “believes a properly circumscribed definition of that term could be critical to fostering communications between consumers and debt collectors, servicers, and other financial service providers.”<sup>6</sup>

The comments of the Consumer Bankers Association, which we support, point out that an overbroad interpretation of what is an ATDS has caused many financial institutions to decouple even their most basic computer-to-telephony technologies, which has forced institutions to manually dial 10-digit numbers and has resulted in misdialed numbers.<sup>7</sup> The use of modern technology, which prevents human error, should be encouraged, not discouraged.

The U.S. Chamber Institute for Legal Reform points out in its comments how the current TCPA landscape is leading to a deluge of costly abusive litigation, quoting a statement from the Chief of Staff for former Commissioner Mignon Clyburn that “the reasonable balance that was originally intended shifted away from business into the hands of activist plaintiffs’ lawyers, and they have taken it all the way to the bank.”<sup>8</sup> NCHER concurs with this sentiment as many of its servicers and collectors of student loans have been the target of abusive litigation.

NCHER also read with interest the 67-page comment filed by the National Consumer Law Center (“NCLC”) on its own behalf and for other national and state public interest groups and legal services organizations.<sup>9</sup> We agree with a number of the recommendations included in the organization’s response. First, we support NCLC’s specific request that the Commission push forward with its initiative to address reassigned numbers by creating a reassigned number database.<sup>10</sup> While we may not be in total agreement on the qualifying criteria, we are encouraged that NCLC recommends creation of a safe harbor from liability for those using the database.<sup>11</sup> Second, we endorse NCLC’s support of the Commission’s idea of designating clearly defined and easy-to-use methods for consumers to revoke consent to receive calls<sup>12</sup> and appreciate that NCLC acknowledges that some consumers may use non-standard revocation methods that are difficult for the caller to detect or understand. NCLC suggests that, with the establishment of specified revocation methods, a court is less likely to conclude that a

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<sup>3</sup> Id., p. 15.

<sup>4</sup> Id.

<sup>5</sup> Comments of the Bureau of Consumer Financial Protection (filed June 13, 2018), p.1.

<sup>6</sup> Id., p. 2.

<sup>7</sup> Comments of the Consumer Bankers Association (filed June 13, 2018), p.2.

<sup>8</sup> Comments of the U.S. Chamber Institute for Legal Reform (filed June 13, 2018), p.6.

<sup>9</sup> Comments of the National Consumer Law Center (filed June 13, 2018).

<sup>10</sup> Id., pp. 32 – 35.

<sup>11</sup> Id.

<sup>12</sup> Id., p. 35.

called party who has used a non-standard revocation would be deemed to have revoked consent.<sup>13</sup> However, we do not believe that student loan servicers or collectors should need to rely on the courts to sustain their procedures and protect them from liability. The Commission's regulations should clearly list examples of authorized methods that a calling party may use and provide that unspecified methods are not reasonable.

On the issue of the definition of an ATDS, NCHER strongly disagrees with NCLC's conclusion that a broad definition of "capacity" coupled with a carve-out for ordinary use of smartphones is what the District of Columbia Circuit decision suggests.<sup>14</sup> We also take issue with the comments filed by NCLC and the Consumers Union<sup>15</sup> regarding the *Broadnet Declaratory Ruling* and the Federal Debt Rules. Among other things, the Consumers Union urges the Commission to "re-issue or even further strengthen" the Federal Debt Rules.<sup>16</sup> Similarly, NCLC recommends that the Commission issue strict rules under the Budget Act Amendment.<sup>17</sup> Using student loans as an example, NCLC states that it "does not dispute that calling consumers repeatedly is likely to push more of them to make payments on these debts. Indeed, consumers may be so desperate to stop relentless calls that they use the rent money or forego food or healthcare in order to stop them."<sup>18</sup> NCHER notes that this scenario should never happen in the context of federal student loans owed to or guaranteed by the government, as struggling borrowers have the ability to enroll in an Income-Driven Repayment Program where the monthly payment amount can be as low as \$0 per month. As pointed out in our comments and earlier in these reply comments, consumers would be harmed by the recommendations of NCLC and the Consumers Union. Finally, in setting the number of calls under the Budget Act Amendment, NCLC says that it supports a low limit (presumably the three-calls-per-month included in the Federal Debt Rules).<sup>19</sup> However, in another proceeding, we note that NCLC recommended to the Commission that:

*"The FCC should limit collection calls to three calls per week, voicemail messages to one per week, and call-backs to once per week unless the consumer gives specific consent at the time of the call."*<sup>20</sup>

This recommendation is, of course, significantly more permissive than the limit included in the Federal Debt Rules that NCLC now supports.

NCHER appreciates the Commission's interest in taking a renewed look at some of the misguided provisions of the Omnibus Order issued in 2015 and the Federal Debt Rules issued in 2016 that have proven harmful to student loan borrowers. Struggling borrowers want - and need - timely and accurate

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<sup>13</sup> Id., p. 37.

<sup>14</sup> Id., p. 21.

<sup>15</sup> Comments of the Consumers Union (filed June 13, 2018).

<sup>16</sup> Id., p. 5.

<sup>17</sup> NCLC Comments, pp. 50-57.

<sup>18</sup> Id. p. 54.

<sup>19</sup> Id., pp. 55-56.

<sup>20</sup> Notice of Ex Parte Presentation signed by Margot Saunders, Keith Keogh, and Ellen Taverna, (dated June 6, 2015 [sic], posted June 12, 2014), p. 12.

information to better manage their student loan debt and avoid delinquency and default, and to rehabilitate those loans that have defaulted. We encourage the Commission to move forward with this important initiative and stand ready to be of assistance in this effort.

Sincerely,

A handwritten signature in black ink, appearing to read "J P Bergeron", with a stylized flourish at the end.

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